03-1308

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MITCHELL ROSENQUIST,

Petitioner,

-v-

OTTAWAY NEWSPAPERS, INC., d/b/a THE PLATTSBURGH PRESS REPUBLICAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit of Appeals correctly held that the evidence adduced by petitioner was insufficient to permit a jury to find that the respondent did not act in good faith in selecting the independent medical examiner and crediting his conclusion that petitioner was incapable of performing the essential functions of his former job with or without reasonable accommodation?

2. Whether the Second Circuit of Appeals correctly held that respondent did not violate an obligation to provide a reasonable accommodation to petitioner?

3. Whether the Second Circuit Court of Appeals correctly found that there was no merit to petitioner's argument that the probable cause determination rendered by the EEOC was dispositive on the issue of summary judgment?

STATEMENT PURSUANT TO RULE 29.6

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves the tragedy of a young man stricken with a brain aneurysm, which deprived him of many of his basic functions. Although he could no longer perform the essential functions of his job as a reporter for the respondent, he has accused his former employer of having discriminated against him by not re-instating him to his employment and of failing to provide him with a reasonable accommodation, although the evidence, including the statements of petitioner's own doctors, overwhelmingly demonstrates that no reasonable accommodation existed which would have enabled him to perform the essential job functions.

In his continuing refusal to face this difficult reality, petitioner has petitioned this Court for a writ of certiorari. In doing so, however, petitioner slants the facts of the case and misstates the Second Circuit's opinion. For example, as noted by the Second Circuit, petitioner, when seeking reinstatement, did not provide respondent with a fitness for duty letter from his physician. He merely provided a note indicating that his own physician did not object to the petitioner's returning to work, but "making no reference to Rosenquist's ability to do the particular job he sought" (Appendix, p. 25). The relevant facts are best summarized in the Second Circuit's opinion, as well as the opinion of the District Court, both of which have been reprinted in the Appendix to the Petition. Respondent respectfully refers the Court to those opinions.

In its opinion under the Summary Order, the Second Circuit held that 1) the IME ordered by the respondent was not an unlawful medical inquiry; 2) petitioner failed to provide sufficient evidence to find that respondent did not act in good

faith when it selected the independent medical examiner and relied upon his expert opinion; and 3) respondent did not fail to provide petitioner with a reasonable accommodation of his disability.

REASONS FOR DENYING THE WRIT

I.
THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER AN EMPLOYER MAY RELY ON THE OPINION OF AN INDEPENDENT PHYSICIAN THAT AN EMPLOYEE CANNOT PERFORM THE ESSENTIAL FUNCTIONS OF HIS JOB.

The first problem with petitioner's argument on this point is that it is based on a faulty premise. Petitioner couches this issue in terms of whether the petitioner was entitled to a neutral vocational assessment (Petition p.14). There is nothing in the record below to suggest that Dr. Wharton's assessment of petitioner's abilities was not neutral. Thus, petitioner is attempting to raise an issue that is not even before this Court.

Respondent was entitled to rely on Dr. Wharton's report rather than petitioner's untested opinion of whether he could do the job at issue. *Alexander v. Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003). As evident from the record below, contrary to the factual scenarios in cases raised by petitioner (Petition p.16), Dr. Wharton carefully reviewed petitioner's job duties and was a board certified neurologist, who had considerable experience evaluating his patients' abilities to return to work. Moreover, Dr. Wharton's opinion that petitioner could not perform the essential functions of his job was confirmed by petitioner's own psychologist, neuro-psychologist and neurologist. (See Appendix, pp. 33-43). Petitioner's argument is further eroded by the fact that petitioner's own doctor failed to state that he could perform

the essential functions of the job and, therefore, petitioner in reality relies only upon his own conclusions and assertions. *Id.*; *Feliciano v. Rhode Island*, 160 F.3d 780, 785-86 (1st Cir. 1998). Because petitioner has been unsuccessful on the merits of his case, he is trying to create an issue – no less a conflict among the circuits – that just does not exist.

II.
THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER AN EMPLOYER MUST PROVIDE A TRIAL PERIOD OF WORK AS A REASONABLE ACCOMMODATION

Courts that have reviewed the issue of whether an employer must offer a trial period of work as a reasonable accommodation have uniformly rejected such a claim. A trial period is not a reasonable accommodation under the law and no conflict exists among the circuits on this point. In *Buck v. Fries & Fries, Inc.*, 1998 U.S. App. LEXIS 16125 at **4 (6th Cir. 1998), the employee argued that a required accommodation "was an opportunity to demonstrate his abilities to perform the essential elements of his job." In rejecting this argument the Sixth Circuit held that such:

> Particularized testing of an employee's qualifications is simply not an accommodation under the ADA, because it does not serve to enable an employee to perform his job – it only helps to determine whether the employee is capable of performing his assigned tasks. [The employer] was entitled to rely on its own chosen method of coming to the conclusion that [the employee] was not qualified.

See also *Hagan v. Anderson County Fiscal Court*, 105 F. Supp. 2d 612, 615-17 (E.D. Kentucky 2000) (court denied disability discrimination claim despite plaintiff's suggestion that he be allowed to return to work for a trial period, which the employer did not do); *Swanson v. Allstate Ins. Co.*, 102 F. Supp.2d 949, 962 (N.D. Ill. 2000) (court denied disability

discrimination claim even though employee's counsel had suggested a trial work period, which the employer rejected); *Garofalo v. Tonti Realty Corp.*, 1997 U.S. Dist. LEXIS 819 *1-2 (E.D. La. 1997) (court denied disability discrimination claim even though doctor suggested a work trial, which the employer declined); *Claspell v. Denso Mfg.*, 1998 U.S. Dist. LEXIS 11770 *24-25 (W.D. Mich. 1998) (forcing a defendant to monitor a plaintiff for any length of time is not a reasonable accommodation in that it imposes an unwarranted burden on the employer who may have to commit personnel to monitor the employee and an employer is not required to shoulder this burden under the ADA); *Chinchillo v. Powell*, 236 F. Supp. 2d 18, 24-25 (D.D.C. 2003) (employee's suggestions for accommodation of his severe depression by granting him indefinite leave without pay or extending his trial employment period for several months to allow medical treatment to take effect were not reasonable accommodations where the prospect for improvement was speculative and the trial period would not have enabled him to complete his tasks or perform the job effectively). See also *Gilbert v. Frank*, 949 F.2d 637, 644 (2d Cir. 1991) (a reasonable accommodation does not mean the elimination of the job's essential functions).

Although petitioner supports his claim that he was entitled to a trial period as a reasonable accommodation with a string of cases, none of those cases actually supports that proposition (Petition, pp. 18-19). In fact, he generally relies upon district court, not circuit court cases. In *Gorin v. Apollo Travel Services*, 1999 U.S. Dist. LEXIS 22209 (N.D. Ga. 1999), not only was a trial period not an issue in the case, but the court granted summary judgment in the employer's favor. In doing so, the district court held:

> Employers do not have a generalized burden to investigate possible accommodations (citations omitted). Rather, under this Circuit's law, it is the plaintiff's burden to show not

> only that accommodation exists which would have allowed him or her to perform the essential functions of the job, but also to show that such an accommodation is reasonable. 1999 U.S. Dist. LEXIS 22209 *36.

In *Webster v. Methodist Occupational Health Centers, Inc.*, 141 F.3d 1236 (7th Cir. 1998), the sole Court of Appeals case from *any* circuit offered by petitioner, the trial period accommodation is not even addressed. The issue is similarly not addressed in *Sprague v. United Airlines, Inc.*, 2002 U.S. Dist. LEXIS 14519 (D. Ma. 2002). In that case, the Court notably states that the plaintiff's burden requires the plaintiff to show the proposed accommodation would enable him to perform the essential functions of the job, a concept that is consistent with the notion that a trial period is not an accommodation because it does not serve to enable the employee to actually do his/her job. In *McMackins v. The Elk Grove Unified School Dist.*, 21 F. Supp.2d 1201, 1206 (E.D. Cal. 1998), the only treatment of a trial period is an offhand reference that the plaintiff claimed she told her district representative she was willing to give a clerk position a trial run. However, the court noted, as was the case here, there was no evidence that the plaintiff could have performed the essential functions of her job with or without a reasonable accommodation. *Valentine v. American Home Shield Corp.*, 939 F. Supp. 1376 (N.D. Iowa 1996), the remaining case cited by petitioner, contains some oblique mention of the employer agreeing to part-time work during an eight week period. *Id.* at 1380, 1384-85. However, there is absolutely no suggestion in the case that any sort of trial period is mandatory as a reasonable accommodation.

In sum, the circuit courts, and even the district courts, do not disagree on the principles. Petitioner's effort to force judicial precedent into his view of the world is unavailing and does not create a conflict among the circuits. Respondent therefore respectfully submits that petitioner fails to

present a conflict among the circuits, much less one worthy of a writ of certiorari.

III.
THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE EFFECT OF AN EEOC PROBABLE CAUSE FINDING

Petitioner attempts to find a final conflict by claiming that the Second Circuit made an "unprecedented determination" that a finding of probable cause of an ADA violation by the EEOC is not sufficient to defeat summary judgment. This argument also has no merit.

First, the Second Circuit's decision did not expressly address this issue. Instead, it simply stated in its conclusion that it had considered all of petitioner's arguments and found them to be without merit. (Appendix, p.26).

Second, this issue crafted by petitioner does not create a conflict among the circuits. Indeed, *Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 847 (9th Cir. 1986), *cert. denied*, 484 U.S. 858 (1987), petitioner's leading case on this point and a case in which certiorari was denied, does not, as petitioner claims, declare that a probable cause finding by the EEOC is binding on a court. In *Mitchell*, the Ninth Circuit went no further than to find that although EEOC findings may be significant in a factual determination of discrimination, they are not binding on the court. The Ninth Circuit's decision in *Mitchell* superseded the Ninth Circuit's earlier decision in *Gifford v. Atchinson, Topeka and Santa Fe Railway Co.*, 685 F.2d 1149 (9th Cir. 1982), also cited by petitioner. (Petition, p.19). In any event, *Gifford* did not hold that EEOC probable cause determinations are dispositive in all cases. The decision is limited to its facts where the court found in that particular

case, the report was sufficient to create an issue of fact on a question before the court. (Id. at *4).[1]

Petitioner quickly moves on to the Fifth Circuit to try to create a conflict among the circuits. In his analysis of the Fifth Circuit decision in *Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003) (*cert. den.*, 2004 U.S. LEXIS 1137 (2004)), petitioner omitted a critical footnote. In footnote 13, the court makes clear that an EEOC probable cause finding is merely highly probative and should not be altogether ignored by the district court. Similarly, notwithstanding petitioner's analysis of *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972), the Fifth Circuit again did not imbue an EEOC probable cause determination with per se finality. To the contrary, the Fifth Circuit expressly stated that an EEOC finding is not binding on either the court or the jury and is to be given no more weight than any other testimony given at trial. *Smith v. Universal Services, Inc.*, 454 F.2d at 157.[2] The decision of the Eleventh Circuit relied upon by petitioner, *Bell v. Birmingham Linen Svc., Inc.*, 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. den.*, 467 U.S. 1204, 104 S. Ct. 2385 (1984), also fails to create a conflict among the circuits. In *Bell,* the Court held no more than did the Court in *Smith* and merely stated that an EEOC finding is

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[1] By contrast, the EEOC determination in this case fails to reveal the factual record, if any, upon which it relied in reaching its determination.

[2] The record in this case on summary judgment demonstrates that it is with good reason that courts have denied dispositive status to EEOC probable cause determinations. The EEOC determination issued here was made in July 1999, prior to the employer having had the benefit of discovery. Discovery yielded considerable evidence that undercuts the conclusions reached by the EEOC. Much of that evidence – collected only through discovery in the federal action -- was recounted in the decision rendered by the district court dismissing the case. (See Appendix to Petition For Writ of Certiorari, pp. 31-43).

admissible evidence and highly probative (noting the distinction in evidence between the trial record and the EEOC proceedings).

Petitioner's argument here is further belied by his own remaining recitation of a string of case holdings. At page 20 of his petition, he states that other courts have held that a determination of probable cause by the EEOC is admissible, *but admittedly not dispositive*, to establish a case of discrimination. Petitioner, by his own argument, defeats any possible claim that a conflict among the circuits exists on this point.

SUMMARY

All of the above being said, the other indisputable finding of both the district court and the Second Circuit Court of Appeals is that there is no evidence whatsoever in this record from which a jury could reasonably find that petitioner could perform the essential functions of the position of a reporter with respondent. Conflict among the circuits on an issue of law are without significance if the petitioner cannot prevail on the facts under either legal theory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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